In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1397

DEAN JULIOUS WALSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.; IV R. 11–12)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1969 (IV R. 14). The petition for a writ of certiorari was filed on May 15, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was illegally entrapped into making sales of non-taxpaid whiskey.

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[1] The four-volume record is on file with the Clerk of this Court.

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STATEMENT

At a jury-waived trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of the removal, concealment, possession, transportation and sale of 120 gallons of non-taxpaid whiskey on or about March 9, 1967, in violation of 26 U.S.C. 5601(a)(12), 5205(a)(2) and 5604(a)(1) (I R. 5), and of similar offenses in regard to 132 gallons of non-taxpaid whiskey on or about June 22, 1967. He was sentenced to imprisonment for 13 months, to become eligible for parole at such time as the Board of Parole might determine under 18 U.S.C. 4208(a)(2) (I R. 7; III R. 13). On appeal the conviction was affirmed (IV R. 14).

The evidence showed that Jack C. Berry, a special investigator assisting Alcohol and Tobacco Tax agents in an undercover capacity, was working in Davidson County, North Carolina, with an informant named Shoaf (II R. 3–4). On March 9, 1967, under the direction of one of the agents, Shoaf telephoned petitioner and inquired about purchasing some whiskey. Agent Berry listened in on the conversation (II R. 4, 8). That evening, at about 6:20 p.m., Berry and Shoaf went to a prearranged place and waited. At about 7:10 p.m., petitioner arrived in a Buick and told Berry and Shoaf that "he was the man [they] were to meet." Petitioner also told them, "Just back on down the road, and it will be all right there" (II R. 4). When Berry mentioned to petitioner that a car had followed him to the meeting place, petitioner said "they were all right—that they had followed him down here" (II R. 10–11).

After Berry backed his truck down the road, petitioner and Shoaf unloaded 120 gallons of non-taxpaid whiskey from petitioner's Buick into the government truck (II R. 4–5). Shoaf paid petitioner $580 previously given him by Berry (II R. 5, 6).

On June 22, 1967, Berry personally made arrangements with petitioner to purchase whiskey from him (II R. 5–7). Petitioner drove to a residence Berry had rented and delivered 22 cases of non-taxpaid whiskey which was unloaded and placed in a shed. Berry paid petitioner $638 for the whiskey (II R. 5–6).

Petitioner presented no evidence for the defense (III R. 3).

ARGUMENT

Petitioner's contention that he was illegally entrapped into making the sales of non-taxpaid whiskey is without substance. As this Court stated in *Sherman v. United States*, 356 U.S. 369, 372:

> * * * [T]he fact that the government agents "merely afford opportunities or facilities for the commission of the offense does not" constitute entrapment. Entrapment occurs only when the criminal conduct was "the product of the *creative* activity" of law-enforcement officials. (Emphasis supplied [by the Court].) * * *

Here there was no showing that the sales were the product of creative activity of the law enforcement officials. Although the informant and agent Berry took the initiative in asking to purchase whiskey from petitioner, they did no more than provide him with the

opportunity to engage in the illegal activity, and this did not constitute entrapment. See *Sorrells* v. *United States,* 287 U.S. 435; *Sherman* v. *United States,* 356 U.S. 369; *Masciale* v. *United States,* 356 U.S. 386; *Lopez* v. *United States,* 373 U.S. 427, 434. There is nothing in the record to show that any undue persuasion or inducement was required before petitioner made the sales on the two separate dates involved.[2]

In citing *Massiah* v. *United States,* 377 U.S. 201; *Escobedo* v. *Illinois,* 378 U.S. 478; and *Miranda* v. *Arizona,* 384 U.S. 436 (Pet. 7–8), petitioner apparently makes the argument that he should have been warned by the government agent that he was under investigation prior to any communication with him by the agent. An undercover agent is not, however, under a duty to disclose his identity as such. *Lewis* v. *United States,* 385 U.S. 206.

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[2] It was not necessary that the government introduce as part of its case evidence that petitioner had a previous reputation as a violator of the federal laws relating to whiskey sales. Petitioner's counsel did not even mention the defense of entrapment until the government had closed its case (III R. 3). If the defense had given some indication that it had some factual basis for a claim of entrapment, the government might have found it necessary to produce evidence of petitioner's predisposition to commit the offense.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JUNE 1969.